

Appendix E-1
Washington State Certificate of Need Program
Task Force Report

CON Task Force Comments



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(Editor's Note: the following letters have been repaginated for display purposes)



November 6, 2006

RE: Certificate of Need Task Force Dissenting Report

Madam Chair and Members of the Task Force:

When House Bill 1688 was before the legislature in 2005 to create the Certificate of Need (CON) Task Force, it was my understanding that the Task Force would thoroughly evaluate both the positives and negatives of Washington maintaining a CON program. This evaluation has not taken place. Although the legislation does contain a presumption "that the services and facilities subject to certificate of need should continue to be subject to it," this could not reasonably be taken to mean that there would be only the most limited discussions on the value of maintaining a CON program in our state. After all, how can we consider requiring more facilities and services to be part of the program if there is not sufficient evidence that the current program contains costs or increases the quality of health care?

In fact, the federal government repealed its CON laws in 1985, upon finding that they had failed to reduce health care costs as anticipated. Several states have also repealed their CON laws or scaled back the number of facilities and services that are part of the program. If CON were working to contain health care costs, then I would expect to have heard that states like ours with an already extensive CON program have been more successful at containing costs than states with no CON program (or a limited program). Unfortunately, the Task Force has not been presented with this information.

In fact, in July 2004, the Federal Trade Commission and the Department of Justice issued a report titled *Improving Health Care: A Dose of*

Competition that included several recommendations on how to “improve the balance between competition and regulation in health care. Eliminating CON regulations is one of their recommendations.

Because I have not been provided sufficient evidence that a CON program assists in containing health care costs and improving quality, I cannot support the majority of the recommendations in this report. My opposition to specific recommendations and statements contained in this report is explained below. There are additional recommendations and statements that I also cannot support. The comments I submitted to the task force on October 4, 2006, are also included below.

Preamble

I fundamentally disagree with the statement, “Market forces alone system cannot control health care expenditures.” For the past 50-plus years market forces have significantly diminished from health care because of the third payment system that has distanced the consumer from health care purchasing decisions, and increasing government regulatory efforts to shape the health care system and control its costs. In other words, market forces have not been given a chance to work in health care. I would argue, contrary to the report, that the absence of market forces such as competition and consumer choice have in fact contributed heavily to increases in health care costs.

Purpose and Goals

At this time, I cannot support the recommendation to create a formal state health planning regulatory process of which the CON process would be a part. According to the report, the health planning regulatory process would be designed to create a state health plan. I view this as the government determining what health care facilities and services shall be available within the state. At a time when we should be putting consumers back in control of their health care decisions, this recommendation would only increase government’s control over individuals’ choices. Market forces need to be increased in our health care system, not more government control and oversight.

Criteria for Review of CON Applications

Although I do not support the continuation and expansion of Washington’s CON Program, if the program does continue, I have serious concerns about the recommendation to base CON decisions on the applicants’ provision of charity care that is “commensurate with current community standards for the service(s) to be offered.” My first question on this

recommendation is how and by whom is “community standard” going to be determined, as this is not addressed in the report. Second, isn’t it true that increasing charity care requirements will just accelerate the cost shifting that already exists in health care? Instead of focusing on how we are going to provide more charity care, we need to be focusing on how to get more individuals covered by health insurance. When we do that, the need for charity care will decrease.

I also disagree with the recommendation that CON decisions be based on “whether the applicant agrees to provide services to Medicaid and Medicare enrollees and agrees to not discriminate against Medicaid and Medicare enrollees based upon their coverage”. I understand this to mean that a provider of a CON-covered service or facility could not limit the number of Medicaid and/or Medicare clients it serves. If my interpretation is correct, this will lead to an even greater cost shift from public programs to private payers as public program rates are already significantly lower than private insurance.

Scope of Services and Facilities Subject to CON Review

As noted above, I have not been provided with sufficient evidence that a CON program assists in containing health care costs or improves quality. Therefore, I cannot support the recommendations to expand our state’s CON program to include additional services, facilities or equipment. In the absence of evidence demonstrating that a CON requirement saves money or improves quality, I do not understand how we can consider expanding it. Additionally, the process used by the task force and the advisory group to decide what services, facilities and equipment should either continue to be under CON review or be added to the CON review list was subjective and not based on objective, evidence-based data. Initially there were four broad principles used to determine if something should be CON reviewed (see Appendix B-1). Then the task force asked for more specific criteria to determine whether additional services should be added to the CON review list. The additional criteria were also broad and subjective (e.g. “New, additional or changed services that MAY have a significant adverse impact on the existing health delivery systems’ ability to continue to provide essential services to all residents in an economically feasible manner, or MAY impose significant barriers to access.”) Little information was provided to task force members about each of the services, facilities, and equipment being considered. Decisions were based not on objective, evidence-based data, but on subjective opinions about the service, facility or equipment.

I also believe it unwise to expand our state's CON program when the JLARC Performance Audit of the Certificate of Need Program required by House Bill 1688 identified many improvements that should be made to the existing program. The recommendations of this task force also include significant changes to the operation of the CON program. It is poor public policy to expand the scope of a public program at the same time that substantial changes are being made to the program.

Mechanisms to Monitor Ongoing Compliance

I have concerns regarding the recommendation that the length of compliance accountability and oversight be extended to at least five years after project completion. One of the frequent complaints we hear from facilities and providers is the amount of local, state and federal government regulations with which they must comply. Adding another layer of government regulation onto an already overregulated industry will not only increase the cost of health care, but create additional burdens on health care providers whose primary job should be providing quality care to their patients, not completing government-imposed paperwork.

Summary

I commend the diligent efforts of the Task Force to study this complex issue, but regret that I cannot support its recommendations as I have not been provided sufficient evidence that a CON program assists in containing health care costs and improving quality. The recommendations in this report significantly increase government oversight and control of our health care industry at a time when we should be decreasing the role of government in health care. As stated by Greg Scandlen, "The failures in the health care system are the direct result of the distortions created by government policy. The real solution lies in reducing these distortions and allowing the market to work as it does in every other sector of our economic lives."

Sincerely,

A handwritten signature in black ink, appearing to read "Barbara Bailey", with a stylized, flowing script.

Barbara Bailey
State Representative

Appendices: page 64

Washington State CON Task Force
Statement for inclusion in the final report
Norman M. Charney MD, JD

October 1, 2006

As a member of the task force representing the employers point of view by virtue of my former position as CEO of the Inland Northwest Business Coalition on Health and as a member of the board of governors of the National Business Coalition on Health, I present the following discussion based on the facts and information reviewed while a member of the task force and from my own experiences as a provider, a medical director for insurance companies and a health care consultant over the past 20 or more years.

The Certificate of Need Legislation should be repealed and be replaced by an enlightened Washington State Health Policy and Plan that promotes and creates incentives for the efficient delivery of health care, promotes the delivery of quality health care, provides access to health care for everyone all of which will lead to cost effective health care. This should be done with consideration for the need to have health care providers compete in the market place and be provided with a level playing field with transparency throughout.

The reason for my conclusions is based on the fact that the CON has never been shown to save money in the delivery of health care. In addition, there is no evidence that the quality of care delivered was improved nor was access to residents of Washington enhanced. The State of Washington Joint Legislative Audit and Review Committee (JLARC) of 1999 and 2006 indicated that the goals of the program were not being achieved and that there were some inconsistencies in the way the program was administered.

Although health care is not like other industries, competition with appropriate state licensing and health policy administration can achieve increased quality of care at lower costs. CON is shown to, in effect, actually increase the cost of care. The CON has allowed providers who have been successful in achieving a CON to keep the competition out. It has discouraged innovation and since its inception in 1971 has shown little advantage. We need to take a 21st century approach to health that will require some creative thinking. Continuing a failed process and expanding it will not serve the State of Washington.

We need to repeal the CON legislation and find a new approach. If we continue to do as we have done we cannot expect a better outcome.

The provision of health care services should be guided by a strategic planning process, promoting the forces of competition and cooperation. It should incorporate established community and professional standards of quality, efficiency, effectiveness, equity and the following consistent values:

All care provided should meet national standards of evidence-based medicine. This is a major public interest.

Information about all aspects of care (including financing) should be available to relevant public agencies, providers and consumers.

All providers of health care should be required to contribute their fair share of community-based activities that promote community goals defined by explicit policy.

References:

Improving Health Care: A Dose of Competition. A report by the Federal Trade Commission and the Department of Justice – July 2004

State of Washington Joint Legislative Audit and Review Committee: Effects of Certificate of Need and its Possible Repeal – January 8 1999, Performance Audit of the Certificate of Need Program – June 26, 2006

Certificate of Need Study – Phase I State of Washington – August 18, 2005 –Mercer

The Failure of Government Central Planning: Washington's Medical Certificate of Need Program – January 2006 Policy Brief of the Washington Policy Center

Beyond Health Care Reform: Reconsidering Certificate of Need Laws in a managed Competition System – Patrick John McGinley – 1995 Florida State University Law Review

Competition in Health Care: It takes Systems to Pursue Quality and Efficiency – Alain C. Enthoven and Laura A. Tollen – Health Affairs 7 September 2005 (W5-421) Web exclusive



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October 13, 2006

As a member of the Certificate of Need (CON) Task Force, I would like to share the following comments about this report and the challenges of setting the appropriate levels of capacity in the Washington health care system.

I enthusiastically support the Task Force report which calls for a state health plan, strengthened CON process, and a level playing field for proposed new and expanded capacity.

During our deliberations we heard, on a number of occasions, the viewpoint that "market forces should be allowed to drive the provision of health care services in the direction of higher quality and lower costs." I generally agree with this viewpoint and wish there was societal and political consensus to allow market forces to make capacity decisions. Unfortunately, the consensus is that I should get whatever care my doctor and I want, and somebody else should pay for it. Fundamentally, most consumers have little financial stake in their care, providers determine how much care is appropriate, and some providers may have a financial interest in filling capacity. Those paying for care, primarily government, health plans and employers, have limited ability to monitor or influence quality, efficiency, and capacity.

After reviewing all of the information available to the task force, I reluctantly concluded that market signals are far too weak, and the health care system is unwittingly designed to promote over-utilization and higher costs. We need a strong and effective CON process, backed by a state health plan, to be one force in limiting unnecessary, inappropriate and costly capacity increases.

Changing the broader incentives in health care delivery is outside the scope of this Task Force. Yet, I am hopeful that state policy and legislative leaders will take concrete steps to increase the transparency and accountability of the health care system. The state and other payers must be empowered, through reimbursement methods, to drive higher quality, improved outcomes and lower costs. Only when payers can direct payments to necessary and appropriate capacity will we be able to dismantle the CON regulatory process.

Sincerely,

Steve Hill
Administrator

STATEMENT BY ROBBY STERN, JANET VARON,
DENISE HOPKINS & ELE HAMBURGER TO BE INCLUDED WITH
CON TASK FORCE REPORT

It has been gratifying to work with this group of committed residents of Washington to develop this report to the Legislature. What is interesting about the near consensus we built is that, despite our differences on the role of market forces, we concurred in the need to build a broader and more effective CON process.

A key piece of the CON Task Force recommendation is the need to invest in the development of a State Health Plan that addresses a number of the critical problems we face. Those problems include the need to create a system where residents have access to quality, affordable, cost effective coverage; where health care planning is effective in creating necessary capacity and not over capacity which drives higher costs; where we create incentives for residents to take responsibility to improve their own health and health outcomes; where individual consumers with the means to do so, pay what they can reasonably afford to support their health services; and where the public health is protected through the allocation of necessary resources to the public health system.

A key point of agreement among nearly all members of the Task Force is that a CON process can only be effective, ultimately, if it is guided by a State Health Plan. The CON process can serve as one of the tools for the implementation of a larger and more comprehensive plan.

Finally, and for the record, we would like to be clear that we do not believe that market forces are, by themselves, a rational way to control the delivery of health care to our state's residents. All too often, market forces tend to jettison those individuals who represent the greatest cost and who need health care services the most. In addition, the competition between the various health care providers and institutions lead to the purchase of expensive equipment and large capital expenditures which frequently creates overcapacity. The result is increasing health care costs through over-utilization and the need to recapture the costs of large equipment and capital investments. We believe that health care and public health are much more like fire and police services and should not and cannot be treated as just another retail market. While market forces will inevitably play some role in our reformed health care system, the goal of our health care system - the delivery of quality, affordable, and cost effective health services to all residents must be paramount, and market forces must be regulated in order to meet that goal.

*Robb Stern, Special Asst. to the President
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